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Supreme Court, U.S.
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CASE NO.: 07-145

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES J. TITTLE
Petitioner

vs.

JO ANNE B. BARNHART, Commissioner
of Social Security Administration,
Respondents

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF UNITED STATES
OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHARLES J. TITTLE
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714-840-3487

PETITIONER FOR CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Does the Social Security Administration have the right to ignore their own rules for claiming benefits?

2. Does the court have the right to ignore their duty in collecting all medical records of a appellant?

3. Does the court have the right to ignore the findings in other cases of other districts courts of the same or similar issues, causing conflict of law and confusion?

4. Should the Ninth Circuit Court of Appeals have considered their own findings of case law and United States Constitution, specially denial of Due Process Rights?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that he has no parent companies or nonwholly owned subsidiaries

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the Judgment below be granted.

OPINION BELOW

1. From the federal courts

A. The denial or order of the United States Court of Appeals for the 9th District appears at Appendix A to the petitioner's Petition For Rehearing En Banc.

B. The opinion of the United States Court of Appeals for the 9th District appears at Appendix B to this petition.

C. The Judgment from the local District Court for Central District of California, Southern Division.

D. The Order Adopting Report And Recommendation Of Magistrate Judge from the local District Court for Central District of California, Southern Division.

E. Notice Of Filing Of Magistrate Judge's Report And Recommendation And Lodging Of Proposed Judgment And Order from the local District Court for Central District of

California, Southern Division.

JURISDICTION

The court of appeal's judgment was filed on December 08, 2006. A timely petition for rehearing was filed on or about January 17, 2007 and denied on February 16, 2007. Then an extension of time was requested and granted to June 1, 2007. The jurisdiction of this court is invoked under 28 U.S.C., section 1254(1).

Congress has provided under 28 U.S.C., section 1254, that the United States Supreme Court may review cases by Writ Of Certiorari in civil matters by petition of any party.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The lower Federal District Court violated many Federal Constitutional Rights in their denial to even hear petitioners Social Security Disability case which included substantial medical records as evidence of petitioners disabilities (Physical and Mental condition).

1. The First Statute they violated was 42 UCS 1983 when they failed to give the petitioner fair hear based upon

the evidence; this was done under the color of law and Denial of Equal Protection, with Denial of Due Process Rights.

2. The Social Security Administration, the administrative judge and the lower federal courts have failed to follow their own rules and regulations in hearing petitioner's case. In 2004, the Ninth Circuit established four factors to be considered to determine if a claimant has shown good cause to reopen an application for disability benefits. But, before these four factors are considered, the Social Security Commissioner must bear the burden of developing the claimant's record, Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir. 1995) cert denied 517 U.S. 1122, 116 S.Ct. 1356, 134 L.Ed 2d 524 (1996). The commissioner and the administrative law judge simply ignored their burden of developing the record even when the evidence needed was in the records. A refusal to consider competent and material evidence amounts to denial of Due Process, 5th amendment of the United States Constitution, Donnelly Garment Company v. NLRB, 123

F.2d 215, 222 (8th Cir. 1942) this denial also raises a colorable constitutional issue.

3. Medical records from a current treating physician should have been given "special weight" in determining claimant's medical disability, Embrey v. Brown, 849 F.2d 418, 421 (9th Cir. 1988). These records were never considered by the administrative law judge or federal district court. Again, claimant was denied Due Process, 5th amendment of the United States Constitution Donnelly Garment Company v. N.L.R.B., supra, at 222-223, and 20CFR 404.1519h, 404.1519k and 404.1519m.

Petitioner has shown all a long that there was and is colorable constitutional issues violation in this case. Both the district court and the Court of Appeals had a duty to make a searching investigation of the administrative judge's records in order to determine whether the Commissioner's final decision is supported by substantial evidence on the record as a whole and to determine whether it was made in accordance to the proper legal standards.

In his opposition to the court magistrates' findings and

the findings of the Ninth Circuit of Appeal's finds, the appellant claimed that he administrative judge and later the trial court failed to consider appellants' current VA Medical Records at the VA Hospital in Long Beach, California and the medical records concerning the appellants' past treating physician Dr. Jackson at Kaiser Permanente (Exet 232), and Sorenson v. Weinberger, 514 F. 2d 1112, (9th Cir. 1975).

Under the subtitle, "Your Treating Source", the commissioner acknowledged that the treating source is the preferred source, 20 CFR, section 1519h. Yet, there was no attempt by the commissioner to obtain this preferred source-Dr Laurence Jackson's medical records.

STATEMENT OF THE CASE

Applicants' initial application for disability benefits was filed January 2, 1996, which he claimed he was disabled since October 1, 1992 (Ex P8-2). Although applicants' initial application and reconsideration determination were denied, an Administrative Law Judge (ALJ) vacated the reconsideration determination and

remained applicant's case for evaluation and additional evidence (Exert: P8-2-3).

On October 7, 1998, the Social Security Administration issued a written Notice stating that the Social Security Administration concluded that applicant was not disabled (Exet: P8-3). Pursuant to California procedure, applicant was notified by his attorney that he no longer would represent the applicant with Social Security Administration. Applicant's attorney failed to notify the Social Security Administration that he was withdrawing as applicant's attorney.

According to applicant's August 25, 2000, Transcripts, the applicant testified that he had completed 14 years of schooling (Tr. 57). He also testified that he had problems with his grammar (Tr. 58). He further testified that he had not worked since December 2, 1992 (Tr. 60). He further testified that he had under went quadruple heart bypass (Tr. 60), and he suffered from depression (Tr. 64).

According to a 1997 psychiatric evaluation and report, the applicant sought medical treatment for his depression

from a Dr. Laurence Jackson since 1992. Dr. Jackson placed the applicant on Efferox, and /or other mind altering drugs for depression. The applicant is still taking mind/mood altering drugs to the present.

On or about December 20, 1995, applicant reported to his Kaiser Permanente doctor that he was "having problems with Vertigo", (Exert: 134), and hearing loss (Exert: 148-149). These records were made available to the ALJ but were not discussed in ALJ's final ruling. In his report and Recommendation of Magistrate judge, Magistrate J. Wistrich also failed to discuss applicant's vertigo or even consider this disability.

It is enough to say that the administrative law judge totally relied on non-treating physicians. These physicians, Dr. Plastka and Dr. Tran, failed to consider the claimant's daily doses of mood-altering, anti-depressant drugs (Exerts 13: 416-417 and AB: 3-6.

In order to find substantial evidence on the record as a whole, the magistrate judge was required to carefully analyze the applicant's entire record. He did not.

Therefore, he created error as a matter of law, Wilcutts v. Apfel, 143 F3d 1134, 1136-1137 (8th Cir. 1998). More importantly, applicant's due process rights were denied in the district court and later on appeal.

Magistrate judge did not discuss the applicant's treatment by Dr. Laurence Jackson. These reports were vital to determining if applicant should have had his January 2, 1996 application reconsidered, SSR 91-5p. It is one thing for the administrative judge to ignore evidence in the record favorable to the applicant. It is another thing for the federal court to fail to carefully analyze the entire records. This failure to carefully analyze the entire records which was a denial of applicant's Due Process Rights, 5th amendment of the United States Constitution.

Recently, the Ninth Circuit has recognized four factors which the adjudicator must consider in determining if a claimant has shown good cause to reopen an application for disability of benefits. The petitioner has more than met this showing of good cause, Valdivia-Ramos v. Barnhart, 347 F. Supp. 2d 911, 917-918 (D.Or. 2004). No error would have

taken place if there been a careful analyze of the benefits, and no denial of Due Process, 5th amendment of the United States Constitution, Sultan v. Barnhart, 368 F. 3d 857, 862 (8th. Cir. 2004).

REASON FOR GRANTING THE PETITION

It has been a long standing national policy that Social Security proceedings are not adversarial in nature. Because Social Security proceedings are non adversarial, the commissioner has the duty to develop an adequate record which a reasonable conclusion can be drawn. Part of this duty is obtaining reports from treating physians, Heggarty v. Sullivan, 947 F. 2d 990, 997-998 (1st Cir. 1991).

Failure to develop the record in Social Security proceedings should raise legal issues not issues of fact.

The administrative judge may not improperly discredit the treating physician, Campbell v. Barnhart 178 F.Supp. 2d 123, 135 (D.Conn. 2001).

The lower court has failed to look at cases presented of the same issues at bar.

Appellant presented cases from several different Circuit

Courts districts in his Opening Brief (OB hereafter for Opening Brief). The court has failed to recognize or even look at the following cases for the reason stated with each case.

Title II and XVI of the Social Security Act, Mosa v. Barnhart 367 F.3d 882,885(9th Cir. 2004)(OB:P3).

1. Failed to combine all the illnesses or disabilities effect on appellant, McDonald v. Secretary of Health and Human Service, 795 F2d 1118, 1126-1127 (1st Cir. 1986), Sheffield v. Callahan 9 F.Supp. 2d 75, 80-81 (D. Mass 1998); Holly v. Chater 931 F. Supp 840, 850 (S.D. Fla 1996)(OB: P9-10).

The cases stated here are just a few of the cases from different jurisdiction that the court failed to recognize, creating conflicts of law, and denial of Social Security Benefits, Due Process Rights, Human Rights, Constitutional Rights. This court should also look at ending the conflict of the different courts for simplicity. Therefore, this court should grant Writ of Certiorari in this case and all other

with similar issues.

CONCLUSION

Based upon on the foregoing statements above, this court should grant the Writ of Certiorari in the interest of justice.

Dated: May 31, 2007

(Resigned Aug. 1, 2007)

Respectfully Submitted

CHARLES J. TITTLE, In Pro Se

APPENDIX A

UNITED STATE COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES J. TITTLE, No. 05-55926

Plaintiff - Appellant, D.C. No. CV-02-01066-AHS

V.

JO ANNE B. BARNHART, Commissioner of Social Security Administration ORDER

Defendant - Appellee

Before GOODWI, Leavy, and FISHER, Circuit Judges.

The panel for rehearing en banc.

The full court has been advised of the rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35

the petition for panel rehearing and the petition for rehearing en banc are denied.

No further filing will be accepted in this close appeal.

APPENDIX B

UNITED STATE COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES J. TITTLE,

Plaintiff - Appellant,

V.

JO ANNE B. BARNHART, Commissioner of Social Security Administration

Defendant - Appellee

No. 05-55926

D.C. No. CV-02-01066-AHS

JUDGMENT

Appeal from the United States Court for the Central District of California (Santa Ana).

This cause came on to be heard on the transcript of record from the United States District Court for the Central District of California (Santa Ana) and was duly submitted.

On consideration whereof, it is now ordered by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 12/08/06

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CHARLES J. TITTLE,

Plaintiff,

V.

Case. No. SACV-02-01066-AHS (AJW)

JO ANNE B. BARNHART, Commissioner of Social Security Administration

Defendant,

JUDGMENT

IT IS ADJUDGED that defendant's decision is affirmed.

Dated: Jun 13, 2005

ALICEMARIE H. STOTLER
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

CHARLES J. TITTLE,

Plaintiff,

V.

JO ANNE B. BARNHART, Commissioner of Social Security Administration

Defendant,

Case. No. SACV-02-01066-AHS (AJW)

ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Pursuant to 28 U.S.C.,section 636(b)(1)(C), the Court has reviewed the entire record in this action, the attached Report and Recommendation of Magistrate Judge ("Report"), and the objections thereto. Good cause appearing, the Court concurs with and adopts the findings of fact, conclusion of law, and recommendations contained in the Report after having made a de novo determination of the portions to which

objections were directed.

IT IS SO ORDERED

Dated: Jun 13, 2005

ALICEMARIE H. STOTLER
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CHARLES J. TITTLE,

Plaintiff,

V.

JO ANNE B. BARNHART, Commissioner of Social Security Administration

Defendant,

Case. No. SACV-02-01066-AHS (AJW)

NOTICE OF FILING OF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND LODGING OF PROPOSED JUDGMENT AND ORDER

TO: All parties of Record

Steven G. Rosales
Lawrence Rohlfing Law Office's
12631 E. Imperial Highway, Suite C-115, Santa Fe-Springs, CA 90670-4756

Marcus Kerner, Assistant US Attorney,
Santa Ana Branch-Civil Division

You are hereby notified that pursuant to the Local Rules Governing Duties of Magistrate Judge, the Magistrate Judge's report and recommendation has been filed and a proposed judgment and/or order has been lodged on March 4, 2005, copies of which are

attached.

Any party having objections to the report and recommendation and the proposed judgment and/or order shall, not later than March 17, 2005, file and serve a written statement of objections with points and authorities in support thereof before the Honorable Andrew J. Wistrich, US Magistrate Judge.

Failure to so object within the time limit specified shall be deemed a consent to any proposed findings of fact. Upon receipt to so objections, or upon laps of the time for filing objections, the case will be submitted to the district Judge for disposition. Following entry of judgment and/ or order, all motions or other matters in the case will be considered and determined by the District Judge.

The report and recommendation of a Magistrate Judge is not a final appealable order. A notice of appeal pursuant to Federal Rules of Appellate Procedure 4 (a)(1) should not be filed until entry of judgment and/ or order by the District Judge.

CLERK, UNITED STATES DISTRICT COURT

March 4, 2005 By Y. Benavides

Deputy Clerk

Attachments

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CHARLES J. TITTLE,

Plaintiff,

V.

JO ANNE B. BARNHART, Commissioner of Social Security Administration

Defendant,

Case. No. SACV-02-01066-AHS (AJW)

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Plaintiff filed this action seeking review of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying plaintiff's application for disability insurance benefits. The parties have filed a Joint Stipulation ("JS") setting forth their contentions with respect to each disputed issue.

Administrative Proceedings

Plaintiff filed his initial application for disability

insurance benefits on January 2, 1996, alleging that he had been disabled since October 1, 1992 [JS 2; Administrative Record "AR") 78]. After plaintiff application was denied at the initial and reconsideration levels, an Administrative Law Judge ("ALJ") vacated the recondition determination and remind the case for the evaluation of additional evidence and a revised reconsideration determination. [AR 43]. The ALJ's April 20, 1998 decision stated that plaintiff "will be advised of the revised reconsideration determination on the case and of the right to request a hearing with respect to that determination." [AR43].

On October 7, 1998, the Social Security Administration ("SSA") issued a written notice stating that it had looked at plaintiff's claim again, as the ALJ had ordered, and again had concluded that plaintiff was not disabled. [AR 298-301; see also AR 295]. The notice was addressed to plaintiff, and it also

indicated that a copy was mailed to plaintiff's attorney[1]. [AR 298, 301]. The notice advised plaintiff of his right to appeal by requesting hearing within 60 days and explained how to do so. [AR 299-300]. Among other things, the notice explained that the 60 day period started the day after plaintiff received the letter, and that the SSA "assume(s) you got this letter 5 days after the date on it unless you show that you did not get it within the 5-day period." {AR 300]. The notice also advised plaintiff that he could file a new application at any time, but that if he did so without appealing the October 7, 1998 decision, he might lose or be denied benefits, and the new application might be denied because of the unappealed decision. [AR 300]. Plaintiff did not file a request for hearing with respect to the October 7, 1998decision.

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[1] On February 6, 1998, plaintiff appointed attorney Joseph R. Lanspa in writing to represent him in connection with his disability claim. Plaintiff authorized Mr. Lanspa, among other things, "to receive any notice in connection with my pending claim(s) or asserted right(s)." [AR 49].

On August 10, 1999, plaintiff filed a second application for benefits again alleging disability since October 1992. [AR 328-329]. A disability determination and transmittal form in the record indicates that this application was denied initially on September 24, 199. [AR 296]. For reason that are not apparent from the record, however, the SSA issued s notice of reconsideration dated August 28, 1999, about a month before the initial determination was made. [AR 38-41]. The notice stated that plaintiff's request for reconsideration had been denied, and that "(s)ince no additional evidence was submitted, the report(s) listed in our previous notice were used to decide your claim." [AR 38}. The notice does not specify the date of the "previous notice" or why or why the August 1999 notice was issued there is no corresponding request for reconsideration in the record.

In response to the SSA dated September 30, 1999. [AR 399]. The letter requested that plaintiff's August 1999 application be withdrawn and that his 'original, first claim

dated January 1996 be reopened," and it asserted that the January 1996 claim remains open and pending for a resolution." [AR 399].

On or about October 22, 1999, the SSA issued a notice of reconsideration denying plaintiff's request for reconsideration. The notice stated that a medical report received on October 20, 1999, was used to decide plaintiff's claim "in addition to, those listed on our previous notice." [AR 302]. In response to the October 22, 1999 notice of reconsideration, plaintiff filed a written request for reconsideration on November 29, 1999, with attachments including a letter asking to "appeal" the October 22, 199 denial of reconsideration. [AR 307-310]. Plaintiff also noted that he had requested that his "recent claim dismissed, due to the fact your office has mislead me in my claim so that you could use it to deny me back pay." [AR 309].

On March 17, 2000, a notice of reconsideration was issued denying plaintiff's November 29, 1999 request for

reconsideration. [AR 297, 311-315]. Plaintiff timely filed a request for hearing. [AR 316-318]. Following a hearing conducted on August 25, 2000, ALJ John Flanagan issued a written hearing decision dated January 29, 2001. [AR 32-37, 51-77]. The ALJ concluded that plaintiff's January 1996 application had been finally adjudicated because plaintiff did not pursue his administrative remedies after the "revised reconsideration" decision dated October 7, 1998, and that good cause did not exist to reopen that application or to reconsider the issue of disability through October 7, 1998. [AR 32-33].

With respect to plaintiff's August 1999 application, ALJ found that plaintiff had severe impairments consisting of history of coronary artery disease with bypass grafting in 1984 and intermittent chest pain, but that his impairments did not preclude him from performing light work on or before December 3, 1998, his date insured for disability insurance purposes. [AR 37]. The ALJ determined that plaintiff could perform his past relevant work as a senior development

engineer on or before his date last insured, and therefore that he was not disabled through December 31, 1998. [AR 37}. The Appeals council denied plaintiff's request for review of that decision. [AR 22-23].

Standard of Review

The Commissioner's denial of benefits should be disturbed only if it is not supported by substantial evidence or if it is based on the application of incorrect legal standards. Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002); Osenbrock v. Apfel 240 F.3d 1157, 1162 (9th Cir. 2001). Substantial evidence is more than a mere scintilla but less than a preponderance. Richardson v. Perales, 402 U.S. 389, 401 (1971); Thomas, 278 F.3d at 954. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. "Richardson, 402 U.S. at 401 (quoting Consolidated Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (1938)); Thomas, 278 F.3d at 954. The court is required to review the record as whole, and to

consider evidence detracting from the decision as well as evidence supporting the decision. Also, where the evidence is susceptible to more than one inference, and one of which supports the ALJ's position, ALJ conclusion must be upheld. Verduzco v. Apfel 188 F.3d 1087, 1089 (9th Cir. 1999); Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995).

Statement of disputed Issues

the disputed issues are whether the ALJ erred in (1) finding that plaintiff did not appeal the denial of his January 1996 application and in denying reopening on that basis; (2) evaluating plaintiff's mental impairment; (3) evaluating plaintiff's testimony; and (4) evaluating the testimony of plaintiff's daughter, Cynthia Tittle. [JS 2].

Discussion

Res judicata and denial of reopening

Plaintiff contends that ALJ applied an "incorrect legal standard" because he was "misinformed" as to the facts concerning plaintiff's January 1996 application. Plaintiff

contends that because he appealed the reconsideration denial notice dated August 28, 1999 with a letter asking that his January 1006 application be considered the operative application for benefits, the ALJ was obliged to consider and adjudicate the entire period of alleged disability from October 1002 onward. In other words, plaintiff contends that the ALJ erred in finding that January 1996 application was finally adjudicated on October 7, 1998 (the date of revised reconsideration notice on plaintiff's January 1996 application). Plaintiff also argues that, even assuming that he did not appeal the October 1998 reconsideration denial, the ALJ erred in denying reopening of his January 1996 application, thereby giving res judicata effect to the October 7, 1998 decision denying benefits.

Although applied less rigidly to administrative than to judicial proceedings, the principles of res judicata apply to administrative decision. See Lester v. Chater, 81 F.3d 821, 827 (9th Cir. 1995); Chavez v. Brown, 844 F.2d 691, 693 (9th Cir.

1988); see also 20 C.F.R. section 404.957(c)(1); 416, 1457(c)(1) (ALJ may dismiss hearing request or refuse to consider one or more issue(s) on res judicata grounds). The doctrine may be invoked to bar reconsideration of disability claim that has been finally adjudicated unless its invocation would "contravene an overriding public policy or result in manifest injustice." Thompson v. Schweiker, 665 F.2d 936, 940 (9th Cir. 1982); see also Lester, 81 F.3d at 827. For purpose of apply res judicata, the denial, the denial of a disability insurance benefits application at the initial or reconsideration level constitutes final and binding decision unless that decision is appealed or revised. 20 C.F.R. section 404.905, 404.921, 404.987(a); see Lester, 81 F.3d at 827 (res judicata may be applied "to bar reconsideration of a period with respect to which [the commissioner] has already made a determination").

A final determination denying a disability claim also creates a presumption that the claimant retains the ability to work after the date of period, final administrative decision. See

Schneider v. Commissioner of Social Sec. Admin., 223 F.#d 968, 973 (9th Cir. 2000); Lyle v. Secretary of Health and Human Service, 700 F.2d 566, 567 (9th Cir. 1983). This presumption of "continuing non-disability" may be overcome by a showing of "changed circumstances." To demonstrate "changed circumstances," a claimant must present new facts establishing a previously unlitigated impairment or other apparent error in the prior determination, or show that the claimant's unrepresented status has resulted in a inadequate record. See Lester, 81 F.3d at 827-828; Chavez F.2d 693.

In this case, substantial evidence support the ALJ's finding that plaintiff's January 1996 application was finally adjudicated on October 7, 1998 because plaintiff did not appeal the reconsideration decision issued on that date. The record contains a copy of the October 7, 1998 notice addressed to plaintiff as well as to his attorney. The reconsideration notice plainly pertains to plaintiff's January 1996 application (his only application at that point) because it states that p[laintiff

"appealed the earlier decision on this claim" and that ALJ "told us to look at your claim again using new information." [AR 299]. Also in the record is a disability determination and transmittal form corroborating the denial of reconsideration on October 7, 1998. {AR 295].

The October 7, 1998 reconsideration notice advised plaintiff how to request a hearing and the consequences of failing to do so. Plaintiff acknowledges that he did not request a hearing. He contends, however, that his failure to do so should be excused because he never received the October 7, 1998 reconsideration notice. That contention is unavailing.

To begin with, plaintiff first assertion that he never received the notice in the reply portion of the Joint Stipulation, thereby depriving defendant of an opportunity to respond in her portion of the Joint Stipulation. [JS 6]. See United States v. Ullah, 976 F.2d 509, 514 (9th Cir. 1992) (court ordinary will not consider issues raised for the first time in reply brief). Plaintiff, however, adduced no evidence, either in the

administrative proceeding or in this case, to substantiate his assertion that he never received the October 7, 1998 notice. In addition, the October 1998 reconsideration notice indicates that a copy was mailed both to plaintiff and to his attorney. Moreover, plaintiff does not contend his attorney was not sent a copy or that his attorney did not receive it.

Finally, plaintiff did not tell the ALJ or appeals Counsel that he did not receive the October 7, 1998 reconsideration notice. To the contrary, he told that Appeals Council that he received the notice. To the contrary, he told that Appeals Council that he received the notice but did not know what to do about it. [See AR 9-25, 53-57, 536-539]. In his position statement to the Appeal Council filed by the non-attorney who represented him before that body, plaintiff alleged that

> [o]n October 7, 1998, claimant received a denial on his remind. At this point claimant did not how tp proceed after a remind denial. Claimant was given incorrect information by the Social Security Office who directed

> him to reapply for Social Security Disability benefits agin. After the claimant re-applied for SSDI, he learned that he had to appeal his remind denial. On September 30, 1999, Claimant wrote a letter to the Social Security Administration and requested to withdraw his new application for benefits. The Social Security Administration acknowledge [sic] the error in giving claimant incorrect advise [sic] and provided claimant with the correct form to file (See attached SSA 5002 Report of contact dated 10-05-99).

[AR 517 (exhibit citations omitted)].

The october 1998 reconsideration notice explained in plain language what plaintiff needed to do if he disagreed with the denial of reconsideration, and what could happen if he did not request a hearing. [AR 299-300]. At the time, plaintiff apparently also had a lawyer who presumably could have assisted him. [See AR 301, 309-310]. The court has reviewed the record but has been unable to locate a document

corresponding to the "Report of Contact" referenced in plaintiff's statement to the Appeal council. Moreover, plaintiff is represented by an experienced social security disability attorney in this case, and he has not made the same argument in this case that he made to the Appeal Council. Indeed, he has contradicted his assertion to the Appeals Council by asserting in this case that he never received the October 7, 1998 notice. In any event, there is not evidence in the record to support either of the contradictory versions of the facts put forward by plaintiff. Under these circumstances, substantial evidence supports the ALJ's finding that the October 7, 1998 reconsideration denial was final and binding because plaintiff failed to appeal that decision.

Plaintiff also contends because he promptly responded to the August 27, 1999 notice of reconsideration with a letter asking that his January 1996 application be "reopened", the ALJ was required to consider the entire period of alleged disability from October 1992 onward. In other words, plaintiff

argues that his reopening to the August 1999 notice, which was issued after he filed his second application for benefits, somehow remedies his failure to respond to the October 1998 reconsideration notice pertaining to his first application for benefits. Absent evidence that plaintiff and his attorney did not receive the October 1998 reconsideration notice or were affirmatively mislead by a representative of the Social Security Administration, plaintiff's response to the August 1999 notice is not relevant to his failure to appeal a notice he received some ten months earlier[2].

Plaintiff has not shown that the ALJ's application of res judicata in this situation was manifestly unjust or contravenes any overriding public policy. Accordingly, the ALJ did not err

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[2] Plaintiff suggests that his September 1999 letter shows he was "unaware" of the October 1998 determination, but that letter is too ambiguous to be significantly probative of plaintiff's knowledge with respect to the October 1998 decision or the actual statues of his January 1996 application. Furthermore, plaintiff's lack of awareness of the October 1998 notice is not dispositive because plaintiff did not adduce any evidence showing non-receipt of that notice

in finding that October 7, 1998 reconsideration determination was final and binding, and that it constitutes res judicata with respect to the issue of plaintiff's disability through that date.

Plaintiff also contends that even if he not appeal the October 1998 reconsideration determination, the ALJ erred in denying reopening of his January 1996 application. Absent a colorable constitutional claim, however, Commissioner's refusal to reopen a final decision denying benefits for an earlier period is discretionary, and therefore is not subject to judicial review. UDD v. Massanari, 245 F.3d 1096, 1098-99 (9th Cir. 2001) (as amended) (citing Califano v. Saunders, 430 U.S. 99, 107-109 (1977)); see Lester, 81 F.3d at 827; Krumpelman v. Heckler, 767 F.2d 586, 588 (9th Cir. 1985), cert. Denied 475 U.S. 1025 (1986). Plaintiff alleged that the denial of reopening violated the regulations governing reopening, in particular 20C.F.R. section 404.988. [JA 6-7]. That is not a constitutional claim, nor is it a meritorious argument. Section 404.988 permits a decision to be reopen "for any reason," provided

reopening is requested within twelve months of the decision, but it does not make reopening mandatory simply because a request is field within twelve months. See 20 C.F.R. section 404.987(b), 404.988(a)

Because the ALJ did not err in applying the doctrine of res judicata, and because this court lacks subject matter jurisdiction to review the denial of reopening of plaintiff's January 1996 application, the ALJ properly limited his consideration to the question weather plaintiff was disabled beginning on October 8, 1998 and no later than December 31, 1998, his date last insured. [See AR 32-33,37].

Mental impairment

The ALJ found that plaintiff did not have medically-determinable mental impairment. [AR 37]. Plaintiff contends that the ALJ improperly weighed the medical evidence pertaining to plaintiff's mental condition.

Under the Social Security Act, disability is defined as the inability to do any substantial gainful activity by

reason of any medically determinable physical or mental impairment that can be expected to result in death or which has lasted or can expected to last for a continuous period of not less than 12 months. An "impairment" must result from anatomical, physiological, or psychological abnormalities that can be shown by medically acceptable clinical and laboratory diagnostic techniques. Although the regulations provide that the existance of medically determinable physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, the regulations further provide that under no circumstances may the existence of an impairment be established on the basis of symptoms alone. Thus, regardless of how many symptoms an individual alleges, or how genuine the individual's complaint may appear to be, the existence of a medically determinable physical or mental impairment cannot be established in the absence

of objective medical abnormalities; i.e. medical signs and laboratory findings.

Social Security Ruling ("SSR") 96-4p, 1996 WL 374187, at *1-*2.

If a medically-determinable impairment exists, the ALJ also must determine whether that impairment meets the twelve-month durational requirement and is "severe". An impairment is not severe " when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have *no more than a minimal effect* on an individual's ability to work." Yucket v. Brown, 841 F.2d 303, 306 (9th Cir. 1988) (italics in original)(quoting Social Security Ruling ("SSR") 85-28, 1985 WL 56856, at *3). The ALJ is required to consider the claimant's subjective symptoms in making a severity determination only if the claimant "first establishes by objective medical evidence (i.e., signs and laboratory findings) that he or she has a medically determinable physical or mental

impairment(s) and that the impairment(s) could reasonably be expected to produce the alleged symptom(s)." SSR 96-3p, 1996 WL 374181, at *3.

Plaintiff argus that ALJ erred in finding that plaintiff did not have a medically-determinable mental impairment because he did not "look to all of the evidence," including psychiatric opinions dating back to 1994, and did not properly evaluate that evidence. [JS 13], see JS 7-14]. If the ALJ had been obligated to consider whether plaintiff was disabled beginning with his alleged onset date of October 1992, he would have been obliged to consider the medial records relevant to that period. As it stands, however, the denial of reopening means that plaintiff was found "not disabled the period ending on October 7, 1998, the date of the final and binding reconsideration decision, and he is presumed to be not disabled after that date unless he can show changed circumstances. The ALJ noted that "[a]ny reference to medical evidence adduced during the period of time relevant only to the earlier claim is made for

purpose of context only," not for the purpose of reconsidering on the merits the claim that was finally denied on October 7, 1998. [AR 32-33].

Although the ALJ summarized evidence relevant to plaintiff's condition before October 7, 1998, including workers' compensation evaluations from January 1994 and may 1997, he stated that he "agreed" with reports from the Commissioner's examining physician and the non-examining state agency physician that plaintiff did not have a medically determinable mental impairment. [See AR 35 (citing Exhibits B2F [AR 416-418] and [AR 512])]. Those two evaluations were issued closest in time to the relevant period. They consist of (1) a July 1998 consultative psychiatric evaluation report prepared at the Commissioner's request by George Prastka, M.D., a specialist in psychiatry and neurology [AR 416-418]; and (2) a non-examining state agency psychiatrist's opinion dated March 13, 2000 concerning plaintiff's condition before December 31, 1998. [AR 512; see also AR 511].

On July 10, 1998, Dr. Prastka conducted a "complete psychiatric evaluation comprised of a history, mental status examination, and review of medical records. Dr. Prastka described plaintiff' as a poor historian." [AR 416]. When he asked plaintiff to identify his chief complaint, plaintiff response, "[a]fter prolonged hesitation, and fumbling with with", was "I can't answer that question". Plaintiff's mental status examination "was entirely within normal limits", aside from plaintiff's complaints of "lack of self-confidence, self-assurance, and fearfulness", which "are all subjective experiences and impossible to measure". [AR 418]. Dr. Prastka observed that plaintiff's inability to perform emotionally in the high pressure job of senior designer and development engineer for major aircraft company is not necessarily the sign of a mental disorder, but has much more to do with personality characteristics and personality type. Some people with the same training can handle such pressure, some can't". [AR 418]. Dr. Prastka commented that he had read and considered the

July 1997 works' evaluation report prepared by Dr. Greenzang, but it "d[id] not require comment". [AR 418]. Dr. Prastaka concluded that plaintiff did not have any psychiatric diagnosis because there was no evidence of any mental disorder. [AR 418]. Dr. Prastaka concluded that plaintiff did not have any psychiatric diagnosis because there was no evidence of any mental disorder. [AR 418].

In March 2000, Evelyn Aquino-Caro, M.D., non-examining state agency psychiatrist, opined that the evidence did not establish a medically-determinable psychiatric impairment through plaintiff's date last insured. [AR 512]. Therefore, the opinions of the examining and non-examining psychiatrist were entirely consistent. Those decisions constitute substantial evidence supporting the ALJ's finding that plaintiff had no severe mental impairment.

Plaintiff argues that the ALJ erred because he misinterpreted Dr. Greenzang's May 1997 workers' compensation report and erroneously relied on it without

"translating" Dr. Greenzang's opinion into social security disability terms. [See AR 227-245]. Dr. Greenzang opined that plaintiff had diagnoses of anxiety not otherwise specified and psychological factors affecting his medical condition (coronary artery disease). [AR 236]. Dr. Greenzang concluded that plaintiff had mental functional limitations that were mostly "slight to moderate". [AR 240-242]. Plaintiff argues that a "moderate degree of limitation" in the workers' compensation context " is 'severe' in the Social Security disability program," and that the ALJ wrongly assumed that Dr. Greenzang's opinion was consistent with his RFC assessment because he did not appreciate that distinction. [JS 7-11].

Although the ALJ commented favorably on Dr. Greenzang's report, which was prepared about 17 months before the relevant date, he specifically adopted the opinion of Dr. Prastka and Aquino-Caro, both of whom agreed that plaintiff had no medically-determinable psychiatric impairment. Those opinions constituted substantial evidence supporting the

ALJ's RFC assessment. See Thomas, 278 F.3d at 957 ("The opinions of non-treating or non-examining physicians may also serve as substantial evidence when the opinions are consistent with independent clinical findings or other evidence in the record".).

Even if the ALJ misinterpreted the significance of Dr. Greenzang's opinion, the ALJ did not err in finding that plaintiff had no psychiatric impairment because he was free to reject Dr. Greenzang's opinion, which was controverted by the opinions of Commissioner's examining and non-examining physicians. Like Dr. Prastka, Dr. Greenzang was an examining physician. Dr. Greenzang examined plaintiff for purpose of his workers' compensation case, while Dr. Prastka examined plaintiff for purpose of his social security disability claim. Dr. Greenzang was not a treating physician, and therefore his opinion is not entitled to any special deference in relation to Dr. Prastka's opinion. See Andrew, 53 F.3d at 1040-1041 (explaining the standards governing the evaluation of

examining and non-examining physicians' opinions); cf. Booth v. Barnhart, 181 F.Supp.2d 1099, 1106-1108 (C.D. Cal. 2002) holding that although the ALJ erred in taking a treating physician's worker's compensation disability rating at face value for purpose of evaluating a social security disability claim, the "translated workers' compensation opinion was not entitled to controlling weight under the standards used to weigh medical opinion evidence in social security disability cases). Dr. Prastka and Dr. Greenzang both specialized in psychiatry and neurology, so the degree of specialization does not tip the scale in favor of Dr. Greenzang. Dr. Prastka's opinion was consistent with the opinion of the non-examining physician, who also is a psychiatrist. See 20 C.F.R. section 404.1527 (factors used to evaluate medical opinion evidence include include consistency with other evidence and area of specialization). Both of those physicians presumably were familiar with the standards used to evaluate social security disability claims. See 20 C.F.R. section 404.`5`9n ("The

medical sources who perform consulative examinations will have a good understanding of our disability programs and their evidentiary requirement."); 20 C.F.R. section 1527 (f)(2)(i) (State agency medical and psychological consultants and other program physicians and psychologists are highly qualified physicians and psychologists who are also experts in Social Security disability evaluation."). Finally, Dr. Prastka examined plaintiff much closer in time to relevant period than did Dr. Greenzang. The timing is relevant because even Dr. Greenzang indicated that plaintiff's condition was amendable treatment. He recommended that plaintiff receive biweekly "supportive psychiatric care" for "up to two years" (of which more than 14 months had elapsed when Dr. Prastka examined plaintiff), and he suggested that proper care and vocational retraining would help plaintiff reenter the workforce. [AR 243]. Therefore, even if the ALJ failed to appreciate the significance of the workers' compensation terms used by Dr. Greenzang, the ALJ did not err in rejecting Dr. Greenzang's opinion.

Plaintiff further contends that Dr. Prastka report read in total, is not inconsistent with Dr. Greenzang's report" because Dr. Prastka commented that some personality types have less tolerance for stress than others, independent of any mental disorder, and because Dr. Prastka did not specifically challenge Dr. Greezang's opinion. [JS 10] dr. Prastka opinion, however, is clear and unambiguous. If makes no sense to conclude that although Dr. Prastka said there was "no evidence of mental disorder" and that plaintiff's mental status "was within normal limits," he actually agreed with Dr. Greenzang that plaintiff had what amounts to a severe mental impairment and resulting functional limitations. The fact that Dr.Prastka declined to comment on Dr. Greenzang's report does not mean he did not disagree with the findings and conclusion reflected in it. Dr. Prastka may have been highly critical of that report but unwilling to elaborate, or he may simply have concluded it was insufficiently relevant to plaintiff's current mental state to warrant discussion. Whatever the reason, Dr. Prastka was not

obliged to explain his assessment of another physician's report. The ALJ permissibly relied on the opinion of Dr.Prastka and non-examining state agency psychiatrist to find that plaintiff had no medically-determinable mental impairment during the relevant period.

Plaintiff's Testimony about his mental functional Limitations

Plaintiff alleges that the ALJ erred by failing "to present clear and convincing rationale to reject [plaintiff's] testimony of his mental impairment." [AR 16]. In particular, plaintiff argues that the ALJ provided inadequate reasons for rejecting plaintiff's testimony that he cannot do his past work as an engineer because it is too stressful; he gets fatigued and stressed very easily, such as when he hears loud noises; fatigue and stress exacerbate his chest pain due to unstable angina; and stress causes him to become unstable and lose concentration. [See AR 35, 64-67]. Plaintiff contends that this testimony, properly weighed, shows that plaintiff does not have the

"ability to perform the mental requirements of sustained work activity." [JS 13][3]

this argument fails because the ALJ permissibly found that plaintiff did not have a medically-deteminable mental impairment during the relevant period of October 8, 1998 through December 31, 1998, his date last insured. In the absence of a medically-determinable mental impairment "that can be shown by medically acceptable clinical and laboratory diagnostic techniques" and "that could reasonably be expected to produce the individual's pain or other symptoms," plaintiff's subjective allegations of inability to tolerate stress, loss of concentration, and other mental functional limitations cannot be factored into the RFC assessment or provide the basis for a finding of disability. SSR 96-7p, 1996 WL374186, at *2; see Bunnell v. Sullivan 947 F.2d 341, 345 (9th Cir. 1991) (en

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[3] Plaintiff limits his argument to the ALJ's assessment of his mental funtional limitations. He does not challenge the ALJ's RFC assessment insofar as it pertains to his physical functional limitations or his physical subjective complaints.

banc). Accordingly, the ALJ was not obliged to articulate "clear and convincing" reasons (or any reasons) for rejecting the alleged severity of plaintiff's mental functional limitations.

Plaintiff's daughter's testimony

Plaintiff' argues that the ALJ erred by failing to provide reasons for rejecting the testimony of plaintiff's daughter, Cynthia Tittle. Plaintiff lived with his daughter and her two sons, ages 12 and 13. She testified that plaintiff spent a great deal of time in his room, avoided family gatherings and retreated into his room after a few seconds because there was too much noise, cooked oatmeal and microwave stuff," used to be very handy and active fixing cars but "[n]ow you can't really ask him to do much of anything," sometimes was short-tempered with her children, "sleeps quite a bit," sometime was unclear in his conversations with her, frequently asked her for help with spelling, did not take a shower every day, and did not shave all the time. [AR 74-75].

Descriptions of family members in a position to observe

a claimant's symptoms and daily activities are competent evidence and must be considered in determining how an impairment affects a claimant's ability to work. 20 C.F.R. section 404.1513 (e)(2); Smolen v. Chater, 80 F.3d 1273, 1288-89 (9th Cir. 1996); Dodrill v. Shalala, 12 F.3d 915, 918-919 (9th Cir. 1993); Spague v. Brown, 812 F.2d 1226, 1232 (9th Cir. 1987). The ALJ may not disregard the testimony of lay witness without some articulated legitimate justification. Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996) (holding that the commissioner must take into account lay testimony as to a claimant's symptoms unless she expressly determines to disregard such testimony, in which case "[s]he must give reasons that are germane to each witness")(quoting Dodrill, 12 F.3d at 919).

The ALJ did not discuss Ms Tittle's testimony, but that omission is harmless error in the circumstances of this case. See Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir. 1993)(applying the harmless error rule in social security

disability case). First, to the extent that Ms. Tittle's testimony concerns mental, rather than physical limitation, the ALJ was not required to consider it because it because he permissibly found that plaintiff has no medically-determinable mental impairment. Much of Ms Tittle's testimony concerns plaintiff's mental, social, or emotional functioning, rather than his ability to stand walk, sit, lift, carry, or engage in non-exertional physical activities related to his physical RFC. Second Ms. Tittle testimony does not indicate whether, or to what extent, the activities and limitations she described occurred during the relevant time period. Third, even taken at face value, Ms. Tittle's testimony does not establish that plaintiff has disabling mental or physical limitations. Therefore, even if the ALJ were required to credit her testimony, it would not require reversal of his decision finding plaintiff not disabled during the period from October 8, 1998 through December 31, 1998, his date last insured.

Conclusion

For the reasons stated above, the commissioner's decision is support by substantial evidence and reflects application of the proper legal standards. Therefore, it is recommended that judgment be entered affirming the decision of the commissioner.

Dated: 3-3-2005

ANDREW J. WISTRICH
United States Magistrate Judge